REFLECTING UPON THE SCOPE OF ACTION RELEVANT TO THE CRIME OF ECOCIDE, WITH SPECIAL REFERENCE TO THE CASE OF CAMBODIAN FARMERS BEFORE THE INTERNATIONAL CRIMINAL COURT

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INTRODUCTION

The term ecocide was used as early as 1970, when it was first recorded at the Conference on War and National Responsibility in Washington, where Professor Arthur W. Galston 'proposed a new international agreement to ban ecocide'[i]. The term itself became well-recognized and in 1972 at the United Nations (UN) Stockholm Conference on the Human Environment, Mr. Olof Palme, then Prime Minister of Sweden, spoke explicitly in his opening speech of the Vietnam War as an 'ecocide'[ii].

He used the term as a pejorative for all forms of 'ecological warfare', citing examples such as those of indiscriminate bombing, and large-scale use of herbicide and bulldozers[iii]. This definition primarily viewed ecocide as a means, not an end, wherein environmental destruction was used as the means to achieving political or military goals and achievements. This is a view partially accepted and adopted by the Chief Prosecutor of the International Criminal Court, when proceedings were brought against the Cambodian political and economic establishment, over land grabbing charges.

On 7 October 2014, Cambodian farmers, through the Global Diligence organization filed for Prosecution against the "ruling elite", alleging that they had committed mass land grand grabbing, and that it constituted a Crime Against Humanity[iv].

This led to the Office of the Chief Prosecutor of the ICC, in their 2016 Policy Paper, recognized "the destruction of the environment or of protected objects[v]" to be a legitimate metric for the computation of the gravity of a crime; specifically, under the category of a War Crime, using Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute.

However, in this scenario, the scope of the crime is conditional, with presence of active hostilities being necessary, and either of the following,

a. The applicability of customs of international armed conflict, or
b. Be directed towards people having no direct part in the hostilities[vi].

Additionally, the crime must be heinous in nature, and fall within one of the definitions prescribed in Article 8 of the Rome Statute[vii].

Similarly, in cases of non-existence of armed conflict, where environmental harm was used as a method against a civilian population, there was a widespread recognition of the criminal nature of the act, and the prosecution was successful. For instance, The International Criminal Court had issued a warrant against Sudanese President Al-Bashir[viii], with one of the listed crimes being the contamination of wells and water pumps to target and destroy certain sets of people.

From all this, it is quite evident that environmental crimes, when used as a method to, and committed with the intent of killing civilians or committing any of the core crimes, form a violation of the basic tenets and norms of the international legal order.

These crimes quite clearly fall under the ambit of the crimes listed in Article 5 of the International Criminal Court, which are the same four core crimes listen in the 2005 UN World Summit Declaration to be the threshold for justifying application of the Responsibility to Protect[ix], even going so far as to justify the Third Pillar, i.e. military intervention.

Therefore, even though these two concepts, notions, and/or institutions of law deal with two separate bodies of law (namely, Individual International Criminal Responsibility, and Humanitarian Intervention), the core principle behind them is the same, that of protection of the populace from the most heinous crimes imaginable. One deals with the individual accountability aspect of the problem, and the other deals with the aspect of prevention and mitigation of harm.

This is further exemplified by the notion of Obligations *erga omnes*, a concept pushed forth by the International Court of Justice in the *Barcelona Traction* case judgment, as part of its *obiter dictum*[x]. As explained by Mr. Christian J. Tams, this notion essentially provided for a concept, that when crimes of a certain degree have been committed by a State, that norms of a certain

international standing have been broken, then the State has not only violated its obligations to its own citizens, but also to the international community as a whole[xi].

It constitutes not only a violation of its internal obligations, but rather external ones as well. As a consequence, any member of the international community has *jus standi* to bring the relevant State to Court. It effectively introduced what the Romans called an *action popularis*, or a public interest litigation, exclusively for the most important aspects of obligations.

This is to say that when an individual, or a group of individuals, commit a crime of such a nature, there are three parts to the resolution process:

1. Firstly, as under Individual Criminal Responsibility, the group itself is liable, under various customary and treaty provisions, such as the principle of Universal Jurisdiction, as elaborated upon in the Report by the Sixth Committee of the General Assembly, in Resolution 64/117.[xii]
2. Secondly, the violation of the obligations to their own citizens of maintaining their basic human rights, and either directly committing, or acquiescing in the process of gross violation of human rights[xiii].
3. Thirdly, the violation of obligations to the international community as a whole, as under the concept of obligations *erga omnes*. While this provides countries with a *jus standi* to bring claims against other countries, there is very little basis for international jurisdiction on such matters.

Therefore, when we look at tangible actions to prevent/mitigate the harm caused by ecocide or crimes of a similar nature, we have to focus the first two more than the third.

SCOPE OF POTENTIAL ACTION

In a dangerous world marked by overwhelming inequalities of power and resources, sovereignty is for many states their best – and sometimes seemingly their only – line of defense. But sovereignty is more than just a functional principle of international relations. For many states and peoples, it is also a recognition of their equal worth and dignity, a protection of their unique identities and their national freedom, and an affirmation of their right to shape and determine their own destiny[xiv].

The defense of state sovereignty, by even its strongest supporters, does not include any claim of the unlimited power of a state to do what it wants to its own people. The Commission heard no such claim at any stage during our worldwide consultations. It is acknowledged that sovereignty implies a dual responsibility: externally – to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state. In international human rights covenants, in UN practice, and in state practice itself, sovereignty is now understood as embracing this dual responsibility. Sovereignty as responsibility has become the minimum content of good international citizenship[xv].

The development of this new definition of sovereignty led to the emergence of the notion of the Responsibility to Protect. The responsibility to protect embodies a political commitment to end the worst forms of violence and persecution. It seeks to narrow the gap between Member States' pre-existing obligations under international humanitarian and human rights law and the reality faced by populations at risk of genocide, war crimes, ethnic cleansing, crimes against humanity and other crimes of a similar magnitude[xvi].

The concept of the responsibility to protect drew inspiration of Francis Deng's idea of "State sovereignty as a responsibility" and affirmed the notion that sovereignty is not just protection from outside interference – rather is a matter of states having positive responsibilities for their population's welfare, and to assist each other. Consequently, the primary responsibility for the protection of its people rested first and foremost with the State itself. However, a 'residual responsibility' also lied with the broader community of states, which was 'activated when a particular state is clearly either unwilling or unable to fulfil its responsibility to protect or is itself the actual perpetrator of crimes or atrocities[xvii]'

The next obvious question here is with regards to defining the scope of the acts which come under the heavy ambit of the Responsibility to Protect. Military intervention for human protection purposes is justified in two broad sets of circumstances, namely in order to halt or avert:

- large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
- large scale "ethnic cleansing," actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape[xviii].

When one starts going through this definition, one realizes that, in matters of mass atrocities, intent is irrelevant, and so is State collusion. The natural state of affairs in a State is that the State retains the power to maintain the rule of law, including the norm against mass atrocities. The only reason they wouldn't do so is if either they didn't have the will to do so, or because they had failed in their capacity of organizing the State.

Another important part to look at here is the fact that the loss of life may be actual or it may be apprehended, i.e. that a reasonable threat to life is enough. The act/ loss of life need not have occurred yet, for action against the loss of life to be happened. Even if it is quite reasonable to believe that it may happen, then the action by external agents is justified[xix].

Therefore, if it is quite evident that an action will lead to a large-scale loss of life, then external intervention, military or otherwise, can be justified, as per ordinary Responsibility to Protect norms.

The question which stands before us, therefore, is this - Can human acts which are primarily directed towards the environment, yet cause loss of life as a byproduct, fall within the ambit of the Responsibility to Protect?

A similar question has been posed to the International Criminal Court, with Global Diligence bringing forth a case on the plight of Cambodian farmers, and how they have been harmed by the exploitative practices of the Government and other members of the establishment.

APPLICABILITY OF THE RESPONSIBILITY TO PROTECT AND INDIVIDUAL CRIMINAL RESPONSIBILITY IN THE CASE OF THE CAMBODIAN FARMERS

In 2014, GD Partner, Richard J Rogers, filed a Communication on behalf of victims to the Prosecutor of the ICC, alleging that widespread land grabbing and mass forced evictions amounts to crimes against humanity under international law. The case demonstrates that senior members of the Cambodian government, security forces, and government-connected business leaders planned and perpetrated the crimes. By 2016, over 830,000 people had been adversely affected by land conflicts[xx].

These acts did not have a specific intent of targeting any group, nor of causing any harm to life. Their only intent was to acquire the land, and then use that for agriculture. However, in the process of interacting with the environment in such a way, and as a consequence of that, caused a loss of livelihood for many people, as well as apprehended loss of life.

Following this, the Office of the Chief Prosecutor of the ICC, in their 2016 Policy Paper, recognized "the destruction of the environment or of protected objects[xxi]" to be a legitimate metric for the computation of the gravity of a crime; specifically, under the category of a War Crime, using Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute.

However, this still did not answer the primary question- whether such crimes committed at a time of the absence of an armed conflict would still fall under the ambit of the International Criminal Court.

To answer this question, we have to refer to the core principle behind the International Criminal Court, and how, as we have discussed before, it is linked to the Responsibility to Protect.

Individual Criminal Responsibility and the Responsibility to Protect are two sides of the same coin, with the former dealing with the individuals' prosecution following the commission of crimes, whereas the latter deals with mitigation of harm, and prevention of the crimes in the first place, as well as accountability from the State.

However, we have to consider the fact that while their target demographics differ, the core crimes they are preventing remain the same, and so do the principles that they seek to protect.

Therefore, if there exists a situation where the Responsibility to Protect is applicable, then the process of individual criminal responsibility will be just as applicable to the individuals concerned.

For this, we can refer to the Report of the International Commission on Intervention and State Sovereignty, the origin document for the concept of the Responsibility to Protect. The Report described six scenarios wherein they believed that military intervention will be justified, with the sixth criteria listed under paragraph 4.20 being,

"overwhelming natural or environmental catastrophes, where the state concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened.[xxii] *"*

Now, in this scenario, we clearly see that there is a scope for environmental catastrophe, which would result in a threat to loss of life, and has led to actual loss of life as well. Therefore, it is quite evident that the Responsibility to Protect doctrine is applicable, and applicable in the strongest of terms, since even military intervention can be considered justified under this.

As a consequence, we can also say that the individuals responsible for these acts will have to entail international responsibility under the four core crimes of international law, and therefore jurisdiction under the International Criminal Court can quite clearly be established.

THE QUESTION OF LONG-TERM DAMAGES

One question that still remains unclear, and might still remain, is whether the promotion of activities which contribute to climate change can be considered to come under the ambit of the core crimes, and whether or not individuals can be held internationally liable for the commission of those acts.

Even the ICISS Report seems to defer judgment on a situation like this, saying,

"In both the broad conditions we identified – loss of life and ethnic cleansing – we have described the action in question as needing to be "large scale" in order to justify military intervention. We make no attempt to quantify "large scale": opinions may differ in some marginal cases (for example, where a number of small-scale incidents may build cumulatively into large scale atrocity), but most will not in practice generate major disagreement.[xxiii]"

Here we see how the Commission deliberately left the question of accumulation of a number of small acts open-ended, and it has been left open-ended in international forums since then. Since climate change, pollution, and similar concerns are not committed through individual acts, but rather with accumulation of a number of small acts across a period of time.

Additionally, a very important part of responsibility is attributability, which is extremely difficult, if not impossible, to establish in the world of climate change, since results are almost exclusively globally spread out, and the discovery of causal links between actions and losses is not feasible.

As a result, we stand in a limbo, over the issue of responsibility for climate change, whether that be responsibility on the international community to stop states, or the question of holding individually internationally responsible for the commission of such crimes.

CONCLUSION

When we began this article, we saw how the very meaning of the word ecocide can have wide ranging applications and meanings. We then looked at how it was quite evident that when environmental harm is done with the intent of killing individuals, international responsibility is applicable, and the four core crimes come into the picture.

We then looked at the untenable links between three notions, about how the core philosophy of the Responsibility to Protect, Obligations erga omnes, and Individual Criminal Responsibility for the core crimes are the same.

We then applied these principles to answer the question of jurisdiction for the International Criminal Court, and answered it by saying that environmental harm is inherently a part of the ambit of the Responsibility to Protect, and can therefore be considered to be linked to the core philosophy of the core crimes, thus bringing the International Criminal Court's jurisdiction into an area of legitimacy.

This legitimacy can then be used to prosecute the relevant individuals, who were, in this case, the Cambodian government, security officers, and connected businesses.

We were not, however, able to establish whether there was any way to attribute the plurality of actions relating to climate change, and whether a number of small acts could accumulate to form what the ICISS called "large-scale loss of life."

ENDNOTES

[i] New York Times, 26 February 1970; quoted in Weisberg, Barry (1970), Ecocide in Indochina. Canfield Press, San Francisco.
[ii] Björk, Tord (1996): The emergence of popular participation in world politics: United Nations Conference on Human Environment 1972, Department of Political Science, University of Stockholm.
[iii] Statement by Prime Minister Olaf Palme in the Plenary Meeting, June, 6, 1972, available at:http://www.olofpalme.org/wp-content/dokument/720606a_fn_miljo.pdf
[iv] Oehm, Franziska Maria. "Land Grabbing in Cambodia as a Crime Against Humanity – Approaches in International Criminal Law." *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America*, vol. 48, no. 4, 2015, pp. 469–490. *JSTOR*, www.jstor.org/stable/26160058 .

[v] Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation, 15 September 2016
[vi] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010).
[vii] Ibid.
[viii] Application for arrest warrant or summons to appear (article 58), Document containing the charges (regulation 52).
[ix] Arbour, Louise. "The Responsibility to Protect as a Duty of Care in International Law and Practice." Review of International Studies 34, no. 3 (2008): 445-58.
[x] Barcelona Traction, Light and Power Company Limited (New Application, 1962), Belgium v Spain, Judgment, Merits, Second Phase, ICJ GL No 50, [1970] ICJ Rep 3, (1970) 9 ILM 227, ICGJ 152 (ICJ 1970), 5th February 1970, United Nations [UN]; International Court of Justice [ICJ]
[xi] Obligations Erga Omnes in International Law, Sources of Law, Christian J. Tams, UN Audiovisual Library of International Law
[xii] The Scope and Application of the Principle of Universal Jurisdiction: The Report of the Sixth Committee A/64/452- RES 64/117
[xiii] 2005 World Summit Outcome: resolution adopted by the General Assembly, A/RES/60/1
[xiv] Evans-Sahoun, Report of the International Commission on Intervention and State Sovereignty, December 2001.
[xv] Ibid.
[xvi] United Nations Office on Genocide Prevention and the Responsibility to Prevent, https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml
[xvii] Ibid.
[xviii] Evans-Sahoun, Report of the International Commission on Intervention and State Sovereignty, December 2001.
[xix] Chesterman, Simon, R2P and Humanitarian Intervention: From Apology to Utopia and Back Again (August 1, 2018). Robin Geiß & Nils Melzer (eds.), The Oxford Handbook on the International Law of Global Security (Oxford University Press)

[xx] Communication Under Article 15 of the Rome Statute of the International Criminal Court, The Commission of Crimes Against Humanity in Cambodia, July 2002 to Present, available at: https://static1.squarespace.com/static/5bf447e7365f02310e09e592/t/5eb178be2da21b0620c19194/1588689097212/executive_summary-ICC.pdf
[xxi] Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation, 15 September 2016
[xxii] Evans-Sahoun, Report of the International Commission on Intervention and State Sovereignty, December 2001.
[xxiii]Ibid.